

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

BUTTE DIVISION

C. THOMAS MESSICK,  
Individually and as Personal  
Representative of the ESTATE  
OF THERESA J. MESSICK,

and

DARRELL E. BOWMAN, as Personal  
Representative of the ESTATE  
OF JOAN R. BOWMAN,

Plaintiffs,

vs.

PATROL HELICOPTERS, INC.,

Defendant.

CV-07-039-BU-CSO

**ORDER ON PLAINTIFFS'  
MOTION TO STRIKE**

Plaintiffs filed this action on May 21, 2007, in the Montana Eighteenth Judicial District Court. Defendant Patrol Helicopters, Inc. ("Patrol"), removed the action to this court on June 20, 2007, alleging jurisdiction under 28 U.S.C. § 1332.

Plaintiffs now move to strike the following portions of Patrol's Answer: (1) defenses found at p. 2, ll. 5-7 and ll. 14-

15 of the Answer; (2) the Fourth and Fifth Affirmative Defenses to the extent they assert negligence claims and claims for contribution and/or indemnity against Darrell Bowman; and (3) the Seventh Affirmative Defense in its entirety. Having reviewed the record, together with the parties' briefs in support of their respective positions, the Court rules as follows.

**I. BACKGROUND**

This action arose on July 16, 2006, when a passenger car operated by Darrell E. Bowman ("Bowman") collided with a truck owned by Patrol and operated by Patrol's employee Daniel Lyons ("Lyons"). Both vehicles were northbound on U.S. Highway 89 in Park County, Montana. Joan Bowman, Theresa Messick and Thomas Messick were passengers in the vehicle driven by Darrell Bowman. The Complaint alleges that, as a result of the negligence of Lyons, Theresa Messick and Joan Bowman were killed and Thomas Messick was severely injured. *See Complaint, Court's Doc. No. 4 at ¶ 6.*

After the accident, Patrol and Lyons asserted claims against Bowman and thereafter settled those claims. *See Plaintiffs' Brief in Support of Motion to Strike ("Plaintiffs' Brief"), Court's Doc. No. 9, at p. 2.* As part of the settlement, both Patrol and Lyons signed releases of liability in favor of Bowman. The Plaintiffs here also settled their claims against Bowman and executed releases of liability in favor of Bowman. *See*

*Plaintiff's Preliminary Pretrial Statement at 13.*

In its Answer to Plaintiffs' Complaint, Patrol "specifically asserts that Darrell Bowman was negligent, and that his negligence was the cause of the collision and the cause of injuries to all persons." *Answer and Demand for Jury Trial, Court's Doc. No. 6, at 2, ll. 5-7.* The Fourth Affirmative Defense ("Intervening and Independent Acts") and the Fifth Affirmative Defense ("Damages Beyond the Legal Responsibility of Answering Defendant") both allege that "Plaintiffs'/Decedents' injuries were caused by the negligence of Darrell Bowman, and [Patrol] reserves the right to file a claim for contribution and/or indemnification against Darrell Bowman, or assert a Non-Party Defense for apportionment of liability against Darrell Bowman pursuant to Mont. Code Ann. § 27-1-703(6), if the Plaintiffs, or any of them, have settled with Darrell Bowman." *Id. at 3, ll 8-11, ll. 16-20.* The Seventh Affirmative Defense asserts the non-party defense. *Id. at 4, ll. 3-6.*

## **II. PARTIES' ARGUMENTS**

Plaintiffs contend the foregoing portions of Patrol's Answer should be stricken as insufficient defenses due to the releases executed by Lyons and Patrol in favor of Bowman. The first half of the first page of the "General Release" Patrol executed identifies the Releasors ("Steven Lyons and Patrol Helicopter, Inc."), Releasee ("Darrell Bowman"), the Date of Casualty (July

16, 2006"), and Sum of Settlement (" \$25,000"). See *Plaintiffs' Brief, Exhibit A*. In addition, the "Description of Casualty" is identified as follows: "Property damage claim arising from Motor vehicle accident." The first paragraph of the General Release provides "Releasors ... fully and forever release and discharge Releasee ... from any and all actions, claims, causes of action, demands, or expenses for property damages ... arising out of the described casualty." *Id.* Plaintiffs argue that the only legal injury a corporation may suffer in this instance is property damage, and thus Patrol released any cognizable claims it had against Bowman.

Plaintiffs alternatively argue that the release executed by Lyons individually must be imputed to Patrol due to the vicarious nature of Patrol's alleged liability. This release follows a similar format and identifies the "Description of Casualty" as: "Bodily injury and emotional distress claims arising from Motor vehicle accident." See *Plaintiffs' Brief, Exhibit B*. Lyons similarly released Bowman from "any and all actions, claims, causes of action, demands or expenses for damages or injuries, including but not limited to ... negligence ... arising out of the described casualty." According to Plaintiffs, this language prevents Lyons, and therefor Patrol, from asserting any negligence claim against Bowman. Thus, Plaintiffs reason that Patrol cannot claim contribution from Bowman or attempt to

establish Bowman's comparative negligence for apportionment of liability.

Finally, Plaintiffs state that Patrol may not assert an indemnity claim against Bowman because Patrol's employee, Lyons, was affirmatively negligent in the accident. Plaintiffs assert that Montana law has never allowed an indemnity claim between parties to a vehicular collision.

Patrol contests each assertion of the Plaintiffs. Patrol notes that Mont. Code Ann. § 27-1-104 (2005) states that a civil action arises out of (1) an obligation, or (2) an injury. Patrol claims Bowman is released only from injury claims; Patrol released Bowman from all property damage claim arising out of the accident, and Lyons released Bowman from all bodily injury and emotional distress claims arising out of the accident. Patrol cites a number of Montana Supreme Court cases for the proposition that contribution and indemnity claims arise from obligation. It follows, Patrol argues, that releasing Bowman from all legally cognizable injury claims does not release him from the obligations of contribution and indemnity.

Patrol also argues Mont. Code Ann. § 27-1-703 (2005) entitles it to present Bowman's fault as a non-party defense even if the releases preclude Patrol's actual recovery from Bowman through contribution or indemnity. Patrol claims the legislature's 1997 amendments requiring notice of the non-party

defense to Bowman and the Plaintiffs and an opportunity to defend cure the due process violation identified by the Montana Supreme Court in *Plumb v. Fourth Jud. Dist. Ct.* (1996), 279 Mont. 363, 927 P.2d 1011.

Finally, Patrol states that unless and until Plaintiffs establish that Patrol or Lyons was negligent, Patrol is not an affirmatively negligent tortfeasor. Thus, Patrol is not currently barred as a matter of law from claiming indemnity.

### **III. DISCUSSION**

The Court identifies the issues presented by Plaintiffs' motion as follows: (1) whether Patrol's assertion of a non-party defense for apportionment of liability against Bowman should be stricken, and (2) whether Patrol may "reserve the right" to file a claim for contribution and/or indemnification against Bowman.

#### **A. Non-Party Defense**

Mont. Code Ann. § 27-1-703 (2005) allows comparison of the negligence of non-parties, such as Bowman, who have settled with and been released by the Plaintiffs. "The Legislature intends that the liability of persons who settle or are released and who may share in the responsibility for a tort cause of action be considered by the trier of fact and apportioned a percentage of damages according to their negligence[.]" Ch. 293, L. 1997 (preamble). The Legislature intended to preserve percentage apportionment of liability to released non-parties

while correcting the constitutional deficiencies outlined in Plumb.

Section 27-1-703 clearly states that the finder of fact may consider the fault of persons released by the claimant. "The liability of persons released from liability by the claimant and persons with whom the claimant has settled must also be considered by the trier of fact, as provided in subsection (6)."

§ 27-1-703 (4). Subsection (6) states in relevant part:

(a) [A] defendant may assert as a defense that the damages of the claimant were caused in full or in part by a person with whom the claimant has settled or who the claimant has released from liability

. . . .

(d) A release of settlement entered into by a claimant constitutes an assumption of the liability, if any, allocated to the settled or released person. The claim of the releasing or settling claimant against other persons is reduced by the percentage of the released or settled person's equitable share of the obligation, as determined under subsection (4).

§ 27-1-703 (6).

The statute places the burden of proof for the non-party's negligence upon the defendant pleading the defense, and sets forth procedural requirements to provide notice and an opportunity to intervene and defend to the non-party whose negligence the defendant asserts as a defense. See § 27-1-703 (6) (e) - (g).

According to the statute, the Plaintiffs assume Bowman's

liability for purposes of negligence comparison because the Plaintiffs settled with and released Bowman. The focus here is on the Plaintiffs' damages claims against Patrol, not Patrol's or Lyons' damage claims against Bowman. Presenting the issue of Bowman's negligence is a defense to Plaintiff's claims against Patrol, not an affirmative claim for damages by Patrol against Bowman.

Plaintiffs argue that Bowman will be denied due process if Patrol presents his alleged negligence to the jury. This is not accurate, however, because the 1997 revisions to § 27-1-703 were designed to address the due process issues outlined in *Plumb*. In this case, Bowman has notice and an opportunity to defend. While it is true that Patrol may not force Bowman to appear and defend, Bowman may elect to defend through intervention. See § 27-1-703(6)(f)(ii),(iii). In short, consistent with the Legislature's intent, so long as Patrol meets the procedural requirements outlined at § 27-1-703 (6)(e)-(g), it may present Bowman's alleged negligence as a defense to Plaintiffs' claims.

The Court concludes that although Patrol's claims for damages against Bowman may be precluded by its release, the release does not prohibit Patrol from asserting Bowman's negligence as a non-party defense to Plaintiffs' claims.

**B. "Reserved Right" to Assert Contribution/Indemnity Claim.**

The Federal Rules of Civil Procedure do not provide a



mechanism for a party to "reserve the right" to assert a defense. Under the plain language of Rule 8, a claim or defense is either asserted or it is not. See Fed. R. Civ. P. 8 (c) ("a party *shall set forth*" its affirmative defenses) (emphasis added); Fed. R. Civ. P. 8(e)(2) (a party is to "set forth" or "state" any alternative or inconsistent claims). A pleading must assert claims clearly to effectuate the pleading's purpose: to fairly notify adverse parties of the issues in the case. See *U.S. Indus./Fed. Sheet Metal, Inc. v. Dir. Off. of Worker's Comp. Prog.*, 455 U.S. 608, 613 (1982).

Many courts considering the question of "reserved" affirmative defenses have stricken those defenses from the pleadings. *E.g.*, *Reis Robotics USA, Inc. v. Concept Industries, Inc.*, 462 F.Supp.2d 897, 907 (N.D.Ill. 2006); *U.S. v. Martell*, 887 F.Supp. 1183, 1193 (N.D.Ind. 1995); *Kelley v. Thomas Solvent Co.*, 714 F.Supp. 1439, 1452 (W.D.Mich. 1989); *County Vanlines, Inc. v. Experian Info. Solutions, Inc.*, 205 F.R.D. 148, 158 (S.D.N.Y. 2002). Although the Ninth Circuit has not directly addressed the question, several district courts within the Ninth Circuit have stricken reserved affirmative defenses from pleadings. *E.g.* *Synopsis, Inc. v. Magma Design Automation, Inc.*, No. C-04-3923 MMC (N.D.Cal. Feb. 6, 2007); *Willson v. Bank of America, NA*, No. C-04-1465 TEH (N.D.Cal, Aug. 12, 2004).

Courts strike reserved affirmative defenses because they do

not actually assert a defense. "[A reserved affirmative defense] serves no function as is and any addition of defenses is properly achieved by the terms of the Rules ...." *Kelly*, 714 F.Supp. at 1452. Reserved defenses merely indicate a possible willingness to assert a defense in the future. This does not comply with the requirement that averments in pleading be "simple, concise, and direct." Fed. R. Civ. P. (8)(e)(1).

Patrol's reservation of affirmative defenses is of no force and effect. Rather than give opposing parties fair notice of the issues, the reservation of affirmative defenses injects ambiguity into the pleadings. This Court will not address the merits of the reserved claims of contribution and/or indemnification against Bowman where said claims have not been asserted. Of particular concern with respect to the "reserved right" to assert claims for contribution and/or indemnity against Bowman is the fact that Bowman is not named as a party here in his individual capacity. *See Plaintiff's Brief in Support of Motion to Strike at page 1, footnote 1.* It is inappropriate for the Court to address such a "reserved" claim against a person or entity not before the Court. If Patrol later believes these claims to have merit, it may move to amend its Answer under the provisions of Rule 15(a), Fed. R. Civ. P.

The Court will also strike those portions of Patrol's 4<sup>th</sup> and 5<sup>th</sup> Affirmative Defenses which purport to "reserve the right"

to assert a non-party defense. It is perplexing that Patrol would "reserve the right" to assert a non-party defense and, in the same pleading, assert that non-party defense against Bowman in its 7<sup>th</sup> Affirmative Defense. The "reserved right" to assert a non-party defense in the 4<sup>th</sup> and 5<sup>th</sup> Affirmative Defenses is therefore moot.

For the reasons set forth above, **IT IS HEREBY ORDERED** that Plaintiffs' Motion to Strike (*Court's Doc. No. 8*) is **GRANTED IN PART and DENIED IN PART**. It is **GRANTED** as to those portions of Patrol's Fourth and Fifth Affirmative Defenses reserving the right to file a claim for contribution and/or indemnification from Bowman or a non-party defense. It is **DENIED** as to Patrol's Seventh Affirmative Defense, and as to p. 2, ll. 5-7 and 14-15 of Patrol's answer.

DATED this 29<sup>th</sup> day of August, 2007.

**/s/ Carolyn S. Ostby**

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Carolyn S. Ostby  
United States Magistrate Judge

